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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

One Ashburton Place, Room, 503
Boston, Massachusetts 02108
(617) 727-2293

SUFFOLK, ss.

Brent E. Sulham,
Appellant,

v.

G1-08-7

Department of Correction,
Respondent.

Attorney for the Appellant:

John W. S. Creedon, Jr.
Fletcher, Tilton & Whipple, P.C.
370 Main Street, 12th Floor
Worcester, MA 01608

Attorney for the Respondent:

Cheryl Brannan
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Division of Human Services
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant Brent E. Sulham (hereinafter "Sulham" or "Appellant") seeks review of the Department of Correction (hereinafter "Appointing Authority", or "DOC"), bypassing him for original appointment to the position of Correctional Program Officer A/B (hereinafter "CPO A/B"). The appeal

was timely filed. A pre-hearing was held on February 14, 2008 and a full hearing was held on April 9, 2008 at the offices of the Civil Service Commission. One tape was made of the hearing. As no notice was received from either party, the hearing was declared private. Following the hearing, both parties submitted proposed decisions.

FINDINGS OF FACT:

Based on the documents entered into evidence, (Joint Exhibits 1-5) and the testimony of Brent E. Sulham, I make the following findings of fact:

1. The Appellant took an open examination for the position of Correctional Program Officer A/B (hereinafter "CPO A/B") in March 2007.
2. The Appellant scored 81 and with his priority due to his veteran status placed him second on the list for employment as a CPO A/B.
3. The Appellant was notified by the DOC that he could sign the civil service list for employment as a CPO A/B, and he did so on October 5, 2007.
4. The DOC performed its usual background check on the Appellant.
5. The Appellant was notified by letter dated January 4, 2008 that he was no longer being considered for employment as a CPO A/B based on an "unsatisfactory background check." (Exhibit 3)
6. The Pre-Employment Background Investigation for the Appellant's employment as a CPO A/B provided the following negative employment information:

"Other than honorable discharge from the Marines followed by a successful career in the Army Reserve. Most recent employer refused to support the applicant for a Correctional Program Officer's Position stating he would not comment he is neutral." (Exhibit 1)

7. Regarding the first sentence of the negative employment aspects, after entering the Marines straight from high school in 1997, the Appellant was other than honorably discharged almost two (2) years later in March 1999.
8. Following his discharge from the Marines nine (9) years ago in March 1999, the Appellant held various positions of gainful employment. The Appellant enlisted with the Army National Guard for six (6) years from November 2000 through November 2006 at which point he was honorably discharged from service.
9. While in the Army National Guard, the Appellant was on active duty in Bosnia and Cuba. He was also awarded two Army Achievement Medals, the National Defense Medal, the Armed Forces Expeditionary Medal, and the Global War on Terrorism Service Medal, two Armed Forces Reserve Medals, the Armed Services Ribbon, the Sea Service Deployment Ribbon, and the NATO Medal.
10. The Appellant earned his Associates Degree from Greenfield Community College in June 2003, and later earned his Bachelors Degree in February 2006 from the University of Massachusetts at Amherst.
11. Letters dated March 28, 2008 from the Appellant most recent employer, New World Security Associates, show that at all times the Appellant was in good standing and was never formally disciplined (Exhibit 4).
12. It appears that the background investigator, Sergeant Orr, submitted a negative report on the Appellant's employment without either viewing the Appellant's personnel record or speaking with those who had access to that information.
13. The negative report on the Appellant's work performance at New World Security was incorrect.

14. During this appeal process, the Appellant applied for a Correctional Officer I (hereinafter, "CO I") position with the DOC.
15. The DOC extended an offer of employment to the Appellant for the CO I position on April 1, 2008 (Exhibit 5). The Appellant underwent the prescreening exams on April 7, 2008 and is scheduled to enter the training academy in May 2008.

CONCLUSION:

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31 § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civ. Serv. Comm'n, 31 Mass. App. Ct. 315 (1991), G.L. c. 31 § 43.

The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the

circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331,334 (1983). *See* Commissioners of Civ. Serv. v. Municipal Ct. of Boston at 86; Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Commission to act. Cambridge v. Civ. Serv. Comm'n, 43 Mass App. Ct. 300, 304 (1997)

In the present case, the Department failed to show that Appellant's bypass was reasonably justified since he was bypassed solely based on an unsatisfactory background check. The Appellant failed the DOC's background check due to the investigator's inclusion of an incorrect and negative employer report. The Commission is mindful of the fact that the DOC has since realized its error and offered the Appellant employment with the DOC as a CO I.

The Commission hereby finds that the Appellant's background was satisfactory at the time he was bypassed for the CPO A/B position, and that the DOC did not have a reasonable justification for bypassing Appellant for a CPO A/B.

It is so ordered that at the time the Appellant enters the DOC Academy, his seniority shall be based on the date on which the DOC bypassed him for the CPO A/B position.

It is further ordered that pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to the Appellant and orders DOC to place the Appellant's

name at the top of the next certification list for the position of Correction Program Officer A/B.

For all of the above reasons, the appeal under Docket No. G1-08-7 is hereby *allowed.*

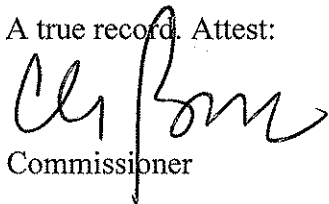
Civil Service Commission



John E. Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor Commissioners) on August 21, 2008.

A true record. Attest:



Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. C. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

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